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IN THE

Supreme Court of the United States

October Term, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of Albert B. Shultz, Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as Co-Executor under the Last Will of Albert B. Shultz, Deceased, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

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Abbreviations

The abbreviations are those used in the petition.

The answering brief for all respondents except Eastman, Dillon & Co. is herein referred to as the Bank's brief. The answering brief for Eastman, *et al.*, is referred to as Eastman's brief.

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OCTOBER TERM, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as Co-Executor under the Last Will of ALBERT B. SHULTZ, Deceased, PERRY E. WURST, LEWIS G. HARRIMAN, FREDERICK B. COOLEY, GEORGE H. CHISHOLM, HARRY L. CHISHOLM, RALPH HOCHSTETTER, ANSLEY W. SAWYER;

and

THOMAS C. EASTMAN, HERBERT L. DILLON, HENRY L. BOGART, JR., GILMER SILER, Individually as well as Co-Partners with JAMES P. MAGILL and MAURICE H. BENT, doing business under the firm name and style of Eastman, Dillon & Company,

Respondents.

Consolidated Causes.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, as Co-Executor under the Last Will of ALBERT B. SHULTZ, Deceased, THOMAS CANTWELL and GEORGE P. REA,

Respondents.

PETITIONERS' REPLY BRIEF

Reply to the Bank's brief

Respondents' argument on the issue of limitations would be appropriate to a brief on plenary hearing. As upwards of one hundred twenty-five authorities are cited, their discussion, much less analysis, is out of the question. A few comments—necessarily discursive—must suffice.

Respecting respondents' answer concerning the First Question presented by the petition (at p. 2), argued under Reasons I-III (at pp. 36-40) of our brief-in-chief.

Respondents substantially default in making answer to our contentions. Their only argument on the subject is the claim that even if the Circuit Court of Appeals was not bound as a matter of law to follow the New York law of limitations, it was proper for it to do so. This argument becomes possible for respondents only by avoiding mention of *Kirby* v. *Lake Shore & M. S. Railroad* (120 U. S. 130), where this court rejected as inconsonant with equity* the identical New York doctrine of limitations applied in the suits at bar. If that case is still law—and respondents neither cite nor refer to *Kirby's case* although it was cited in our brief-in-chief (p. 37) as ruling authority—the decision of the Circuit Court of Appeals was clearly "improper" and constitutes basic error.

Respecting respondents' answer concerning the Second Question presented by the petition (at p. 3), argued under subdivision A of Reason IV (at pp. 40-47) of our brief-in-chief.

Respondents present two main contentions, viz: first, these suits are "nothing more than" actions "at law to recover money only" (Bank's brief, p. 46); second, even if these suits are properly in equity, no accounting is required because complete relief can be had in actions for money received, the demand for an accounting is a mere sham, and, accordingly, the controlling statute of limitations is the six-year statute prescribed for actions for money received. We examine the arguments underlying these contentions and show that they are based upon false premises of law and fact.

Arguing in support of their first contention, respond-

* Because applied "irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant." Mr. Justice Stone in *Russell* v. *Todd*, 309 U. S. 280 at 288, Note 1.

ents invoke the familiar doctrine that as a general rule equity will not decree an accounting in furtherance of a claim based on tort. The only authority cited in point is this court's decision in *U. S.* v. *Bitter Creek Development Co.* (200 U. S. 451) where the tort was not committed within a fiduciary relation and its gravamen consisted of a trespass on timber lands and trover for the conversion of the timber.

Cases of fraud (e.g., *Kirby's case, supra*) present a well recognized exception to the general rule—particularly where the fraud was committed in the course of a fiduciary relationship (e.g., *Kilbourn* v. *Sunderland*, 130 U. S. 505). In the last cited case an agent was found guilty of constructive fraud in that he had realized profit from dealings in the subject matter of his agency. The same claims as those now made by respondents were made in the *Kilbourn case*, to which Mr. Chief Justice Fuller made the following response:

> "*The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.* The parties stood in a fiduciary relationship to each other * * *. 'There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law' (1 Story, Eq. Jur. Sec. 450); and, *as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud has in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations* between the parties throughout the period of their connection, we concur with the supreme court of the District in sustaining the jurisdiction". (Italics ours; 130 U. S. 505 at 515)

The same factors thus indicated by this court in *Kilbourn's case* as establishing equity jurisdiction are plainly present in the suits at bar.

Next respondents assert that "the suit at bar clearly could have been maintained at law." (Bank's brief, p. 55)

The cases and statutes cited for this proposition do not remotely support it and have about as much relevance to this or any other issue in these suits as has the Rule in Shelley's case. The bona fides of this claim will be illuminated by the quotations contained in the note hereto.* We respectfully refer the court to the authorities cited in the note at the bottom of p. 41 of our brief-in-chief as establishing the rule, "never * * * departed from" (*Peters* v. *Smith*, 60 N. Y. Misc. 203 at 205), that no action at law lies by one executor or administrator against his corepresentative.

Respondents' second argument (i.e., that no accounting is necessary) is based on statements of fact some of which are disingenuous and others of which are flatly untrue. It is suggested that petitioners are only seeking an accounting for the syndicate profits derived by those respondents who participated in the syndicate ostensibly formed by Cooley (pursuant to the secret arrangements partially evidenced by Exs. P-112/3); that the profits sought to be accounted for "were *received in money and money alone,*" and that "no property was involved" (italics in original); that the amount of such profits "were and are known and definite", and were "calculated on the same basis as decedent's profits" from the Cooley syndicate (Bank's brief, pp. 44, 48).

Sundry corrections are in order. The second and third of our special prayers for relief read as follows:

> "2. That the defendants and each of them be required to account for all cash and/or the value

* Prior to the institution of the suits at bar petitioners sought to have the Bank removed as their co-executor (petition, pp. 27-8). Opposing this relief, the Bank filed a brief with the New York Court of Appeals signed by all counsel (excepting only Mr. Damon) who now subscribe its brief to this court. At the outset of that brief the Bank stated (p. 4) that it was "well-settled law which permits the institution in equity of an action by one executor against a co-executor to obtain a decree establishing the latter's indebtedness to the estate, even while the latter continues to occupy his testamentary office. (*Wallach* v. *Dryfoos*, 140 App. Div. 438)," and at the end of that brief (p. 65) that "it seems clear in this State that a suit in equity may be maintained by one executor against a co-executor to obtain a decree establishing his indebtedness to the estate. *Wallach* v. *Dryfoos*, 140 App. Div. 438".

of *all property* received by them by reason of their dealings in the stock of Houde prior to December 5, 1928, *including dealings in the stock of Houdaille Corporation* whose sole asset was the stock of Houde, and that the primary defendants be adjudged liable for interest from December 5, 1928, with semi-annual rests on the sums for which they may be held liable to account, and that the other defendants not guilty of active fraud be held liable for simple interest from December 5, 1928.

"3. That the primary defendants [i.e. those guilty of active fraud] pay over to the plaintiffs the damages sustained by decedent * * * less any principal sums for which decrees may be entered and satisfied under the preceding prayer for relief, together with interest".* (Italics and bracketed matter ours; I 30, 127-8).

The pleadings, then, contradict respondents' contentions as to the limited scope of the accounting sought. And so do the proofs. Eastman-Dillon received the bulk of their profit in the form of property, viz.: 10,000 shares of the Class B stock of Houdaille (Mich.) [V., references at petition, p. 23]. Eastman-Dillon also realized a gross trading profit of $216,000.00 upon the public offering of that stock and thereafter engaged in an after-market syndicate for its secondary redistribution [v., Ex. P-460], the amount of the profit on which we were not allowed to prove because the right to an accounting had not been established [II 1042].

Rea and Buffington also had dealings in the stock of Houdaille, and if they did not realize profit therefrom, could have done so [I 695, III 2127].

The amount of these profits is not now "known and definite", nor is the amount of the profits realized by the

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*A reading of these prayers for relief establishes the untruthful character of the suggestions (Bank's brief, pp. 44-5, 47) that petitioners are attempting to recover at one and the same time the profits realized from Houde's stock and the difference between its value and what decedent received therefor. Damages are sought only to the extent necessary to make decedent's estate whole after profits have been disgorged. This is clearly proper and involves no possibility of a double recovery or inconsistency. (Restatement of Agency, §424, Comment e, p. 971). Both remedies are predicated on an affirmance of the transaction.

Bank and its officers from the Houde transactions "known and definite" nor can it be "known and definite" until the items of the syndicate account [Ex. P-192] have been explored and that account recast. The nature of some of these items is indicated in the first note at the bottom of p. 24 of the petition. An examination of the syndicate account [Ex. P-192] and Cooley's cash disbursements ledger [Ex. P-363c] suggests other sources for fruitful inquiry.*

Once the respondents' factual misstatements are exposed the entire basis for their citation of cases where a *complete* recovery could have been had in an action for money had and received is removed. Our brief-in-chief points out (pp. 44-7, 49) the other considerations which make it manifest that actions for money had and received could not constitute adequate, much less complete, remedies in the complicated fact situation disclosed by this record.

Respondents emphasize by frequent iteration still a third argument, viz.: the character of the cause of action sought to be enforced determines the statute of limitations to be applied.

This contention must be examined. There is, of course, no question but that where there are concurrent remedies at law and in equity, the limitation applicable at law controls in equity. But it is not enough that there be some remedy at law. To be concurrent, that remedy must be adequate—as certain, perfect and complete as the remedy afforded in equity. (*Hanover* v. *Morse*, 270 N. Y. 86 at 89; *Hearn Corp.* v. *Jano*, 283 *id.* 139 cf., quotation at p. 3, *supra*, from this court's decision in *Kilbourn's* case.) Thus, where the directors who gained profits from their breach of trust sought to plead the six-year statute (C.P.A. §48 [1]) in bar of their liability in *Potter* v. *Walker*, the New York Appellate Division answered:

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* E.g.—these exhibits indicate that $3,000 was deducted from the Bank's commission "for other expenses". This sum plus $98.48 (representing cost of stock transfer tax stamps on the October 24th sale) was obtained in cash by Cooley. For enlightenment as to Cooley's use of dummy payrolls to obtain cash for "confidential" purposes, please see III, 1902-3.

> "As to these defendants an action at law would not be *as complete* or *effective as the remedy in equity.* (*Falk* v. *Hoffman,* 233 N. Y. 199.) These defendants, therefore, were not entitled to plead the six-year statute of limitations at law, *since the ten-year Statute of Limitations in equity would apply.* (*Hanover Fire Ins. Co.* v. *Horse D. D. & R. Co.,* 270 N. Y. 86.)" (Italics ours; 252 N. Y. App. Div. 244, 246.)

When the profiting directors in *Potter* v. *Walker* renewed their contentions in the New York Court of Appeals, that court approved the reasoning and result of the decision below, and, after paraphrasing the foregoing quotation, said:

> "In respect to those causes of action by which is sought to recover profits received by directors by reason of wrongful acts, *an action at law would not afford adequate relief.*" (Italics ours; 276 N. Y. 15, 25-6.)

It is thus clear that adequacy of remedy and not the nature of the right sued upon controls—that the ten-year limitation (C.P.A. §53) applies to suits in the concurrent jurisdiction of equity unless the remedy at law is as certain, perfect and complete as that afforded in equity. Such is the reading given the New York cases by the present Chief Justice in *Russell* v. *Todd* (309 U. S. 280 at 292, N. 3). And such is the rule adopted by this court, for in that case—although the right sued upon was a statutory legal right and no accounting was necessary—your Honors declined to apply any statute of limitations because the *remedy* was traditionally equitable to enforce rights cognizable only in equity.*

Respondents challenge our statement that the liability in an action for money received is several and not joint. *Cobb* v. *Dows,* 10 N. Y. 335, and the other cases cited to

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* This court denied (310 U. S. 658) a petition for rehearing based upon the fact that *Mencher* v. *Richards,* 256 N. Y. App. Div. 280, relied upon as an alternative ground of decision, had been reversed in the New York Court of Appeals (283 N. Y. 176).

the point at p. 58 of the Bank's brief involve situations where, unlike the fact at bar, the money was received jointly, as by partners.

Respecting respondents' answer concerning the Third Question presented by the petition (at p. 3), argued under subdivision B of Reason IV (at pp. 48-53) of our brief-in-chief.

The petition tenders, and with precision, the question of whether the trial court's fifth conclusion of law to the effect that decedent knew the "basic and material" facts can be upheld in the face of its 84th finding of fact. By that finding, which the Circuit Court of Appeals did not disturb, it was determined that there was no evidence that decedent knew of the arrangements evidenced by Exs. P-112/3, much less that they had been reduced to writing.

Respondents' inability to meet this issue is measured by their failure to mention Finding 84 in their briefs. Instead they misstate our contentions, and proceed to an answer to those contentions, as misstated.

Thus, respondents say (Bank's brief, p. 39) that we "frankly concede (Pet. p. 15) that without the memorandum of October 11th they have no case." There is no such concession at page 15 or at any other page of the petition, and the statement is utterly untrue. Ex. P-112 evidenced some, but not *all* of the agreements made on the night of Oct. 10. Indeed, there was never reduced to writing at all the most important of these agreements, viz.: that the Bank's officers were to have a "substantial part of the purchase" through participation in the syndicate which Ex. P-112 contemplated.

Similarly, respondents argue that Ex. P-113 was not an agreement, but a mere "declaration." This argument begs the question of whether Ex. P-113 (referred to by Cooley and Rea as their "agreement" [I 746-8, II 1120, 1465]) was preceded by an agreement. Respondents' own testimony establishes the fact that before "we came to an understanding" [I 747] there had been lengthy negotiation as to the division of the prospective profits

on the resale of Houde's stock which was the objective of all the parties to the "understanding."*

Eventually respondents are driven to fall back on Judge Clark's argument that had they but been allowed to testify as to their transactions with the decedent, they might have proved that they had made full disclosure of the arrangements evidenced by Exs. P-112/3. But this argument is not available to respondents, for it was conclusively established that these arrangements were kept concealed not only from decedent but from the Bank's own directors as well. [V., references at brief-in-chief, p. 52] And before the existence of Ex. P-113 was known Harriman swore *in these very suits* that it was not until after Oct. 31 (i.e., nearly three weeks after decedent was notified that a binding sale of his stock had been effected) that Cooley had announced that the Bank's officers would participate in the profits of Houde's resale.

Judge Clark's criticism of petitioners' course in invoking C.P.A. §347—the dead man statute—seems unintentionally ironic. The very testimony given by Wurst which he cites [III 2330] was adduced only after petitioners had introduced Ex. P-542 in evidence, Wurst having theretofore repeatedly denied under oath that any such arrangement as that evidenced by that instrument (which bore his signature) had ever existed. [III 2296-7, I 960-2]

Reply to Eastman's brief

The joint and several liability of Eastman-Dillon does not depend on proof of conspiracy, and was clearly established. Since the Bank was Eastman-Dillon's agent in acquiring Houde's stock, the Bank's frauds were Eastman-Dillon's frauds. That liability in no way depends on proof of scienter on the part of Eastman-Dillon. (*Downey* v. *Finucane*, 205 N. Y. 251; *Bennett* v. *Judson*, 21 N. Y. 238;

* Thus, Rea and Wurst traded out the Bank's 50% participation in the profits on a quick resale by successfully urging that Cooley "ought to recognize" that that "would be the proper thing" in the event that no syndicate was formed in which it could participate. [II 1119-20]

Indianapolis Ry. Co. v. *Tyng*, 63 N. Y. 653 at 655). The relationship between co-venturers is one of sub-modal partnership (*Mann* v. *Commonwealth Corp.*, 27 F. Supp. 315, 320), and the torts of one co-venturer are the torts of the other co-venturers on familiar agency principles.

Alternatively, Eastman-Dillon is jointly and severally liable with its agent, the Bank, because it asked for, obtained and still retains benefits derived from its agent's frauds (i.e., $15,000 received and acknowledged by it as "representing *our interest* in commission for the sale of" Houde's stock [Ex. P-86]). Having thus adopted the frauds of its agent, its joint and several liability follows. (*Green* v. *Waddington*, 210 N. Y. 79 at 82; *Krum* v. *Beach*, 96 *id.* 398).

The argument that Eastman-Dillon need not disgorge the $15,000 received by it out of the Bank's commission is founded on the claim, the documents notwithstanding, that this was "a voluntary gift" from the Bank (Eastman's brief, p. 24) and did not come out of its commission. This claim is predicated on the assertion that the Bank did not collect its commission until "some fifteen days after the date of the $15,000 payment to Eastman-Dillon." (Eastman's brief, p. 24) To support this claim respondents cite testimony and documents showing that the Bank did not credit its commission and bond profit account until December 5, 1928. But it is quite immaterial what bookkeeping treatment the Bank chose to give the commission collected by it. The only relevant fact is that on Oct. 24, the Bank drew receipts reciting its collection of a commission of $126,318.33 on the sale of Houde's stock. It follows, of course, that if this $15,000 was a gift, Eastman-Dillon can not occupy the position of a purchaser for value, and must therefore account to petitioners for this amount plus interest.

Reference to the citations contained in our petition and brief-in-chief will show that respondents' claims that we have misstated the facts are unfounded. By inadvertence we did omit to document our statement that the Scully claims presented decedent with the prospect of litigation.

Ex. P-330 is in Sawyer's handwriting; that exhibit and his testimony fully justify our statement.

CONCLUSION

Instead of coming to grips with the issues presented by the decision of the Circuit Court of Appeals and this application, respondents have devoted the bulk of their briefs to an argument in defense of the trial court's determination on the merits. That argument contains dehors the record personalities, and, we think, palpable factual distortions and misstatements. We do not correct these, and leave respondents' arguments on the merits unanswered because the merits are utterly irrelevant to the issues presented by this application.

The pretext assigned for this argument on the merits is that unless petitioners proved a cause of action the issue as to limitations is academic. This position is unsound. The judgment sought to be reviewed is based *solely* on a determination by the Circuit Court of Appeals that any claim for relief is barred by the New York law of limitations. If that decision is erroneous, our clients are, at the least, entitled to a remand to that court for its adjudication as to whether the trial court's determination on the merits can be reconciled with the law and the evidence. If this court's decision in *Kirby* v. *Lake Shore and M. S. Railroad* (120 U. S. 130), is still law, then the judgment at bar must be reversed (v., Finding 84, I 221); and even if *Kirby's case* is no longer law, the decision of the Circuit Court of Appeals must be reversed if in conflict with the applicable New York law of limitations.

The writ of certiorari should issue.

Respectfully submitted,

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